

Before the  
COPYRIGHT ARBITRATION ROYALTY PANEL  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

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In the Matter of )  
ADJUSTMENT OF RATES FOR )  
NONCOMMERCIAL EDUCATIONAL )  
BROADCASTING COMPULSORY LICENSE )

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Docket No. 96-6 CARP NCBRA

**BROADCAST MUSIC, INC.'S REPLY IN FURTHER SUPPORT  
OF ITS MOTION TO COMPEL PRODUCTION FROM ASCAP**

Broadcast Music, Inc. ("BMI") submits this reply in further support of its November 13, 1997 motion to compel production from the American Society of Composers, Authors and Publishers ("ASCAP").

BMI's November 13 motion seeks the production to BMI of any documents which ASCAP will produce in this proceeding to the Public Broadcasting Service, National Public Radio and the Corporation for Public Broadcasting (collectively "PBS/NPR/CPB"), as the result of any order by the Copyright Office, CARP, or otherwise.<sup>1</sup>

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1. BMI's November 13 motion also seeks the production to BMI of all documents which ASCAP had already produced to PBS/NPR/CPB. On November 19, 1997, ASCAP produced documents in response to BMI's initial request and represented in a letter to BMI's counsel that it had produced to BMI all the documents it had already produced to PBS/NPR/CPB. Based on this representation, BMI agrees that the part of its motion which seeks the production of all documents ASCAP has already produced to PBS/NPR/CPB is

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While ASCAP has now apparently produced to BMI all documents it has already produced to PBS/NPR/CPB, it has not agreed to produce to BMI any documents it will produce to PBS/NPR/CPB in the future. To the contrary, it has stated that “[t]he [portion] of BMI’s motion...which seeks to compel ASCAP to produce to BMI any document it may produce to Public Broadcasters in the future -- is without merit.” (ASCAP Opposition Brief at 2.)

ASCAP’s unprincipled position on this point is irrational and unsupportable. As a matter of fundamental fairness BMI is equally entitled to documents to be produced in the future as it is to documents already produced. It is only proper that BMI receive any and all documents ASCAP produces which underlie its direct case. Moreover, ASCAP is the only party that has objected to producing to BMI documents it may produce to another party in the future. PBS/NPR/CPB have proposed, and BMI agrees, that all documents to be produced by the three active parties in this proceeding be exchanged among BMI, PBS/NPR/CPB and ASCAP and that the three active parties enter into a three-way stipulation to do so.<sup>2</sup>

ASCAP argues that, absent a specific determination as to each document it subsequently chooses to withhold, it would be unfair to require it to produce to BMI documents it may produce to PBS/NPR/CPB in the future because of the “extra lawyers [sic] of confidentiality placed between ASCAP and BMI.” (ASCAP Opposition Brief at 3.) ASCAP is referring to the

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moot. See ASCAP’s Opposition to BMI’s Motion to Compel Production From ASCAP, dated November 25, 1997, at 1.

2. See The Public Broadcasters’ Response to Broadcast Music, Inc.’s Motion to Compel Production of Documents from PBS/NPR/CPB, dated November 25, 1997, at 1-2.

October 21, 1997 letter-agreement between it and BMI which imposes a measure of confidentiality in addition to that provided by the October 1, 1997 Protective Order herein, as only designated outside counsel and their outside experts may review documents protected by that letter-agreement. ASCAP cannot rely on these confidentiality measures to withhold responsive documents from BMI's counsel. The entire purpose of these extra measures is to allow for complete discovery, not to hinder it, while protecting any documents produced to BMI's or to ASCAP's counsel.

Moreover, BMI's motion is otherwise proper. First, in requesting all documents produced by ASCAP to PBS/NPR/CPB, BMI intended that this request encompass any documents which ASCAP might provide to PBS/NPR/CPB in the future. ASCAP cites no authority for its assertion that it need not provide these responsive documents to BMI. Section 251.45(c)(1) of the Copyright Arbitration Royalty Panel Rules and Procedures provides that a party may request documents underlying another party's direct case. This would include all documents produced at any time in response to a specific request and all documents produced as a result of an order entered by the Copyright Office, CARP or otherwise.

Second, BMI's November 13 motion is timely. BMI served its initial document request on ASCAP on October 24, 1997. Since BMI did not receive ASCAP's response prior to November 7, BMI was unable to make a motion on November 7 with respect to specific documents. Therefore, on November 7, BMI moved to compel the production of all documents from ASCAP responsive to BMI's initial request. After BMI received ASCAP's response to its initial request, BMI filed and served, on November 14, the due date established by the Copyright Office for "all other motions," its motion to compel the production of documents ASCAP stated it would not produce. Furthermore, ASCAP should be estopped from making any argument as to

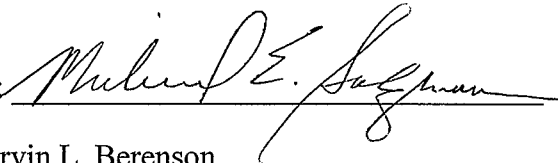
timeliness altogether because any delay in BMI's motion practice was a direct result of ASCAP's untimeliness in serving its direct case on BMI and its resulting failure to comply with the discovery schedule adopted by the Copyright Office.

### CONCLUSION

For the foregoing reasons and the reasons set forth in its opening brief, BMI respectfully requests that the Copyright Office order ASCAP to produce to BMI any documents that it produces to PBS/NPR/CPB in the future course of this proceeding.

Dated: December 2, 1997

Respectfully submitted,

By: 

Marvin L. Berenson  
Joseph J. DiMona  
Broadcast Music, Inc.  
320 West 57th Street  
New York, NY 10019  
(212) 586-2000

Norman C. Kleinberg  
Michael E. Salzman  
Hughes Hubbard & Reed LLP  
One Battery Park Plaza  
New York, NY 10004  
(212) 837-6000

Attorneys for Broadcast Music, Inc.

**CERTIFICATE OF SERVICE**

I, Sherri N. Duitz, an attorney, hereby certify that I caused a copy of the foregoing BROADCAST MUSIC, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO COMPEL PRODUCTION FROM ASCAP in the Matter of Adjustment of Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6, before the Copyright Arbitration Royalty Panel, United States Copyright Office, Library of Congress, to be delivered by overnight federal express on this 2nd day of December, 1997 on each of the parties listed on the attached service list.

Deponent is over the age of 18 years and not a party to this action.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on December 2, 1997.

  
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Sherri N. Duitz

## SERVICE LIST

### **Docket No. 96-6 CARP NCBRA**

Neal A. Jackson  
Denise Leary  
Gregory A. Lewis  
National Public Radio  
635 Massachusetts Avenue, N.W.  
Washington D.C. 20001  
PH: 202-414-2000  
FAX: 202-414-3329

Paula A. Jameson  
Ann W. Zedd  
Public Broadcasting Service  
1320 Braddock Place  
Alexandria, VA 22314-1698  
PH: 703-739-5000  
FAX: 703-739-5358

R. Bruce Rich  
Mark J. Stein  
Tracey I. Batt  
Weil, Gotshal & Manges LLP  
767 Fifth Avenue  
32nd Floor  
New York, NY 10153  
PH: 212-310-8000  
FAX: 212-310-8007

#### **Counsel for National Public Radio and Public Broadcasting Service**

I. Fred Koenigsberg  
Philip H. Schaeffer  
Joan M. McGivern  
J. Christopher Shore  
White & Case  
1155 Avenue of the Americas  
New York, NY 10036-2787  
PH: 212-819-8806  
FAX: 212-354-8113  
**Counsel for ASCAP**

Carey R. Ramos  
Paul, Weiss, Rifkind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, NY 10019-6064  
PH: 212-373-3000  
FAX: 212-373-2773  
**Counsel for NMPA/Harry Fox**

Kenneth M. Kaufman  
Davis Wright Tremaine  
1155 Connecticut Ave. N.W.  
Suite 700  
Washington, D.C. 20036  
PH: 202-296-0533  
FAX: 202-296-0464  
**Counsel for SESAC**

Edward P. Murphy  
National Music Publisher's Association  
and The Harry Fox Agency, Inc.  
711 Third Avenue  
New York, NY 10017  
PH: 212-370-5330  
FAX: 212-953-2384

Henry R. Kaufman  
SESAC, Inc.  
421 West 54 Street  
New York, NY 10019  
PH: 212-586-3450  
FAX: 212-489-5699

Beverly A. Willett  
ASCAP Building  
American Society of Composers,  
Authors and Publishers  
Sixth Floor  
One Lincoln Plaza  
New York, NY 10023  
PH: 212-621-6289  
FAX: 212-787-1381  
**Counsel for ASCAP**

Bruce G. Joseph  
Karyn K. Ablin  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
PH: 202-429-7000  
FAX: 202-429-7049  
**Counsel for National Religious  
Broadcasters  
Music License Committee**